No. 83-993

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

IMPRO PRODUCTS, INC.,
Petitioner,
v.
JOHN B. HERRICK, BABSON BROS. CO.,
UPJOHN CO. and PHILIPS ROXANE, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE ISSUES RAISED BY PETITIONER HAVE NO FACTUAL BASIS OR WERE RESOLVED IN PETITIONER'S FAVOR BELOW.

2. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE APPROPRIATE SUMMARY JUDGMENT STANDARD WAS APPLIED AND NO CONSTITUTIONAL CLAIM HAS BEEN PRESERVED.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals except for defendant Richardson, Myers & Donofrio. Counsel for respondents are informed that, although settlement negotiations are in process between petitioner and Richardson, Myers & Donofrio, no final settlement agreement has been signed as of the date of the filing of this brief in opposition. Two other defendants, Diamond Laboratories, a division of Syntex Corp., and G. D. Searle & Co. settled with Petitioner shortly before the entry of summary judgment in this case.

Babson Bros. Co. has no parent, subsidiary or affiliated companies.

The Upjohn Company has no parent, and has only wholly owned companies.

Philips Roxane, Inc., was a wholly owned subsidiary of North American Philips Corporation at the time of the filing of this case. During its pendancy, this respondent was sold to Boehringer-Inglehein, Ltd., a West German concern.

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RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents, John B. Herrick, Babson Bros. Co., Upjohn Co. and Philips Roxane, Inc. respectfully oppose the Petition for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on August 11, 1983.

OPINIONS BELOW

See Petition for Writ of Certiorari herein, p. 2
(Rule 34.2, Rules of the Supreme Court)

JURISDICTION

See Petition for Writ of Certiorari herein, p. 2
(Rule 34.2, Rules of the Supreme Court)

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED

See Petition for Writ of Certiorari herein, p. 3
(Rule 34.2, Rules of the Supreme Court)

STATEMENT OF THE CASE

Pursuant to Rules 22 and 34.2 of the Rules of the Supreme Court this statement of the case is submitted to correct material omissions and inaccuracies in the statement of the case set forth in the Petition for Writ of Certiorari. On August 3, 1978, Petitioner filed its complaint alleging, *inter alia*, a conspiracy among the defendants to restrain trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Petitioner also alleged certain common law torts in pendent counts.

After motions to dismiss were disposed of and answers filed, Petitioner embarked upon a massive discovery effort. More than one hundred persons were deposed generating in excess of twenty thousand pages of transcript, thirty-two sets of interrogatories were answered, thirteen sets of requests for admissions served and twenty-eight sets of document production requests were filed. In addition, Petitioner filed other suits arguably related to the one at bar and sought to use materials obtained in such cases and from various Freedom Of Information Act requests in this cause. *Impro Products, Inc. v. Herrick*, 715 F.2d 1267 at 1276 n.11 (8th Cir. 1983), A-18.[1]

Contrary to Petitioner's assertions, it pursued discovery and argued against summary judgment on the basis that it had alleged and expected to prove a conventional horizontal conspiracy among the defendants. The plead-

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[1] In order to avoid confusion and needless duplication, references to the Petition for Writ of Certiorari are cited as Pet. ——, references to the appendix of the petition are cited as A-——, references to the appendix to this Brief in Opposition are cited as R.A.-——.

ings, discovery and filings below are replete with references to "a common scheme or plan pursuant to which [the defendants] would jointly carry out activities". 715 F.2d 1267 at 1280, n.16, A-26. The confusion arises from the fact that subsequent to the grant of summary judgment, Petitioner moved for a rehearing on the order and for the first time hinted at its "rimless wheel" or "multiple vertical conspiracy" theory. R.A.-5a-6a. The District Court denied the motion without making any further specific findings. A-60.

In addition to findings of the District Court set out in Petitioner's argumentative statement of the case, the District Court made the following findings regarding these respondents:

Babson

> "The uncontradicted discovery evidence is that Impro and its products were never discussed between Herrick and Babson personnel, or between Babson personnel and personnel of any other corporate defendant, until after Impro initiated this lawsuit.
>
> The uncontradicted discovery evidence is that teat dips and the teat dip market were never discussed between Herrick and Babson personnel." A-41.[2]

Upjohn

> "The uncontradicted discovery evidence is, however, that Herrick never discussed Impro's products or whey antibodies generally or Impro with Upjohn personnel.
>
> There is no evidence that anybody at Upjohn communicated with any of the defendants concerning Impro or its products. In fact, the undisputed discovery evidence is that John Studebaker, the person at Upjohn who was responsible for the original and

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[2] The teat dip market is the market in which Babson and Petitioner allegedly competed.

continued retention of Herrick, did not even know Impro existed until after this lawsuit was commenced. (There were some people at Upjohn, specifically Gene Swenson and Charles Fahro, who did have knowledge of the existence of Impro and its products)." A-44

Philips Roxane

"The uncontradicted discovery evidence is that Herrick and Philips Roxane personnel never mentioned or discussed Impro or its products until after Impro filed this lawsuit.

The uncontradicted discovery evidence is that Philips Roxane personnel never had communications with any of the other corporate defendants concerning Impro or its products until after Impro filed this lawsuit." A-45.

Similar findings were made with respect to each of the defendants who settled both prior to and subsequent to the entry of summary judgment in this case.[8] These findings were specifically adopted by the Court of Appeals. 715 F.2d 1267 at 1277, 1280, A-19, A-25. Petitioner makes no attempt to challenge these findings.

Finding that the consulting arrangements were nothing more than legitimate relationships beneficial to each "corporate defendant", the District Court concluded after an exhaustive analysis and proper application of the legal standards that summary judgment was appropriate. A-57.

On appeal, Petitioner abandoned its horizontal conspiracy claim and sought reversal by reason of the District Court's alleged failure to consider either a rimless wheel conspiracy or a series of vertical conspiracies. 715 F.2d 1267 at 1272-73, A-9. The Court of Appeals in dealing with the two newly espoused theories concluded that no evidence sufficient to warrant a reversal had been offered to the District Court. A-22, A-25.

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[8] See Parties to the Proceedings.

SUMMARY ARGUMENT

Of the five issues presented by Petitioner for review in this case, three were resolved in favor of Petitioner by the lower courts but were not factually supportable in the record (Petitioner's Issues I, II and IV), one was not raised or preserved for appeal in the lower courts, and the last (Issue V) was clearly properly resolved by the lower courts and is merely a request that this Court review the massive discovery record again in search of evidence of a conspiracy neither lower court could find.

The Court of Appeals concluded that the conspiracy provisions of Sections 1 and 2 of the Sherman Act apply to a hub-and-spoke conspiracy as have the two other federal courts who have addressed this issue. Petitioner has been unable to generate any evidence of such a conspiracy. The Petition, therefore, asks for an advisory opinion which is not dispositive of or even properly raised by the case before the Court. Similarly, Petitioner's plea for the Court's review of the standards to be applied in assessing inferences to be drawn from facts does not fairly arise in this case because there was simply no evidence of communication between Respondents concerning Petitioner, let alone communication from which conspiracy reasonably could be inferred. These issues have already been resolved in favor of Petitioner to no avail and are not, therefore, appropriate matters for review.

Petitioner's claim of violation of its right to due process (Issue III) has not been previously raised or preserved and is in any event, without merit in the instant case.

The lower courts applied the appropriate standards in granting and affirming summary judgment, and no further review of the record by this Court is necessary.

ARGUMENT

REASONS FOR DENYING WRIT

I. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE ISSUES RAISED BY PETITIONER HAVE NO FACTUAL BASIS OR WERE RESOLVED IN PETITIONER'S FAVOR BELOW

Petitioner attempts to present five issues for review. None is sufficiently significant to warrant a grant of the Writ. Further, the stated issues do not legitimately arise out of the facts shown in the record.

Petitioner's most significant problem with regard to its petition is that both the District Court and the Court of Appeals found in its favor on every "significant" legal issue in the case. Unfortunately for the Petitioner, both Courts held against it on every important factual issue. This section of the argument will deal with Issues I, II and IV of the Petition.

Petitioner urges the Court to decide that the conspiracy provisions of Sections 1 and 2 of the Sherman Act apply to a so-called "hub-and-spoke" or "rimless wheel" conspiracy. Although this Court may not have directly addressed the issue, every federal court which has addressed the issue, including the Court of Appeals in this cause, has recognized the legitimacy of such an antitrust theory if a proper factual predicate is laid. Indeed, since this Court first hinted that such a theory might be available in 1946 [*See Kotteakos v. United States*, 328 U.S. 750 (1946)], anti-trust plaintiffs have attempted to use it in only three reported cases including the case at bar in the ensuing thirty-seven years. *Impro Products, Inc. v. Herrick*, 715 F.2d 1267, 1279 at n.14 (8th Cir. 1983); *Harlem River Consumer Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251, 1279 (S.D.N.Y. 1976), *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138, 146-47 (6th Cir. 1972). Consequently, there appears to be no conflict among the

Courts of Appeals. In any event, an issue upon which Petitioner prevailed below should not serve as a rationale for a grant of the Writ.

Petitioner also apparently claims in the first section of its argument that this Court should use the case at bar as a vehicle to offer guidance to the Courts of Appeals "as to what is needed to show some types of conspiracies." Pet. 14. There is no logical nexus between this claim and the balance of Petitioner's first issue. Suffice it to say that there is no conflict in the analytical framework or standard of proof among the three cases cited: *Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), cert. granted, 456 U.S. 971 (1982), cert. dismissed, 31 S.Ct. 3100 (1983); *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3rd Cir. 1981), cert. denied, 452 U.S. 893 (1981); and the *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982).

With regard to Petitioner's second alleged reason for granting the Writ of Certiorari, the same rationale for denying the writ applies, for it is again a blatant invitation for an advisory opinion. The case law concerning the inferences to be drawn from conduct in horizontal and vertical conspiratorial cases is not alleged to be in conflict among the Circuits, nor is it alleged to be unclear or even wrong. Petitioner only requests that the Court review the findings of the District Court as to whether Petitioner had met the test for the inference of a "hub-and-spoke" conspiracy set forth in *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.*, 459 F.2d 138, 146-147 (6th Cir. 1972).

In this regard, Petitioner makes all sorts of heavy weather over a claimed oversight by the District Court when it found that the "corporate defendants" did not know that Herrick had consulting relationships with other "corporate defendants". Petitioner claims that this alone is sufficient to prevent the entry of summary judg-

ment. But Petitioner's claim in this regard is founded on a misstatement of the record. Norman Jungk is a mid-level management employee of respondent Philips Roxane serving as Director of Pharmaceutical Research. He testified that when he worked for Diamond Laboratories (a settling defendant) in 1964, he learned that Dr. Herrick consulted for Diamond. Jungk Dep. at 33, 35, R.A.-18a. Jungk left Diamond in July 1964 (Id. at 12, R.A.-17a), and was not employed again in the animal health industry until 1970, when he became an employee of respondent Philips Roxane. Id. at 41-45, R.A.-19a-21a. In 1972, Jungk learned that Herrick was a consultant for Philips Roxane. Id. at 35, R.A.-18a-19a. He had no knowledge of Herrick's continuing relationship with Diamond since he left that Company's employ (Id. at 139, R.A.-22a), and further he never discussed Herrick's relationship with Diamond with anyone at Philips Roxane. Id. at 36, R.A.-19a. Clearly, the District Court's finding that no "corporate defendant" was aware of Herrick's consulting relationships with other "corporate defendants" is correct.

In a larger sense, however, the exclusivity of Herrick's consulting arrangements is immaterial because of the District Court's findings that none of the consulting arrangements included an agreement to harm Impro. Indeed, the District Court concluded that there were never any communications between Herrick and any of the other respondents even mentioning Impro or its products prior to the filing of this action in 1978. This finding is unchallenged by Petitioner! There can be no rimless wheel if there are no spokes. There can be no conspiracy of any sort without communication. Thus, having no factual basis, Petitioner's second issue is a mere invitation to the Court to give an advisory opinion.

With regard to Issue IV in the Petition little need be said other that the Court of Appeals ruled in Petitioner's favor on this theory, as did the District Court (715 F.2d 1267 at 1273, A-10, A-48-49), but both found no factual

predicate. Further, it might be noted that joinder of two such causes of action—or six—as Petitioner now claims to have pled, could present tremendous problems in the trial of such a cause relating to issues such as fact of damage, allocation of damage awards, joint and several liability among defendants and admission of evidence including hearsay during the course of a trial. Joining such claims could create an incredible procedural and evidentiary morass which should not be waded into unless demanded by necessity. These difficult issues should be dealt with only when a genuine factual predicate for them appears in the record.

II. THIS COURT SHOULD NOT GRANT CERTIORARI WHEN THE APPROPRIATE SUMMARY JUDGMENT STANDARD WAS APPLIED AND NO CONSTITUTIONAL CLAIM HAS BEEN PRESERVED

If Petitioner's Issue III can be read as a claim of violation of its rights under the Fifth Amendment to the Constitution of the United States, such issue has not been previously raised or preserved. See R.A.-23a-27a. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). Further, Issues III and V constitute nothing more than a review of the facts and an attempt to draw this Court into a reconsideration of the facts and the inference to be drawn from them. Such is not the role of this Court. *Berenyr v. Immigration Director*, 385 U.S. 630, 635 (1967); *Graves Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1948); *United States v. Johnson*, 268 U.S. 220, 227 (1925).

However, regarding Issue V, it should be noted that both the District Court and the Court of Appeals below applied the appropriate standards in granting and affirming summary judgment. The District Court stated that:

> "[Summary judgment] is an extreme and treacherous remedy, not to be entered unless the movant has established its right to judgment with such clarity as

> to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances." [Citing Authorities] A-31.

Further, the able District Judge observed that all inferences must be viewed in the light most favorable to the Petitioner here and that summary judgments are somewhat disfavored in antitrust cases particularly when motive or intent is in issue. A-31.

Likewise, the Court of Appeals was solicitous of the Petitioner's cause and reviewed carefully the District Court's findings. 715 F.2d 1267 at 1272, A-8. Neither court found any evidence from which a conspiracy to harm Petitioner could be inferred. No important factual finding appears justifying this Court's further review.

CONCLUSION

This case does not present any substantial issue for the Court to review. It does not help Petitioner to observe that this Court has never specifically addressed the issue of whether a Sherman Act violation could occur as a result of a "hub-and-spoke" conspiracy as such an allegation has only been made three times in reported cases in almost forty years. Petitioner's plea for this Court's intervention to review the standards to be applied in assessing inferences to be drawn from facts does not fairly arise in this case because there was simply no evidence of communication between respondents concerning Petitioner let alone communications from which conspiracy reasonably could be inferred.

The only questions Impro raises in its petition center on particular facts in the case and are only of concern to the parties to this cause. Every substantial legal issue arising in this cause has been resolved in Petitioner's favor. Essentially what Petitioner desires is another review of the entire discovery record to ferret out what two thoughtful and diligent courts have been unable to

perceive—evidence of a conspiracy sufficient to warrant a jury determination. As this burdensome request is inappropriate, certiorari should be denied.

Respectfully submitted,

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DATE: January 16, 1984.

APPENDICES

APPENDIX RA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 78-235-2

IMPRO PRODUCTS, INC., a Minnesota corporation,
Plaintiff,

vs.

JOHN B. HERRICK, BABSON BROTHERS CO., an Illinois corporation; RICHARDSON, MEYER AND DONOFRIO, a Maryland corporation; UPJOHN CO., a Delaware corporation; and PHILIPS ROXANE, INC., a Delaware corporation,

Defendants.

MOTION FOR REHEARING OF ORDER
GRANTING SUMMARY JUDGMENT
(Oral Argument Requested)

Impro Products, Inc. through counsel, hereby moves the Court, pursuant to Rule 59(e)* of the Federal Rules of Civil Procedure, for reconsideration Court's Order of August 13, 1982, granting defendants' Motions for Summary Judgment and dismissing all remaining defendants. In support of this Motion, Plaintiff submits that this court has seriously misconstrued Plaintiff's theory of liability under the antitrust laws, and as a result thereof has misapplied the applicable law. In support of this Motion, Plaitniff states as follows:

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* Although Rule 59(e) speaks in terms of a motion to "alter or amend" a judgment, it is clear that the rule is the proper

I. INTRODUCTION

The basis for this court's ruling granting Summary Judgment to the remaining Defendants—simply put—is that Plaintiff has been unable to develop proof of a horizontal conspiracy among the corporate defendants. *See* Memorandum Opinion at 21-25. The answer to this purported lack of proof—equally simply stated—is that under plaintiff's theory of liability proof of agreement between or among the corporate defendants *inter sese*, or even knowledge as to the identity of such corporate co-conspirators, is unnecessary, and that proof upon which an inference of knowledge that others must be involved is sufficient to establish the element of concerted action. Plaintiff further submits that the public policy considerations recently enunciated by the Supreme Court in *ASME* v. *Hydrolevel Corp*, —— U.S. ——, 102 S.Ct. 1935 (1982) strongly favors a finding of antitrust liability on the basis of the facts presented in this case.

II. PLAINTIFF HAS ESTABLISHED THE ELEMENT OF CONCERTED ACTION THROUGH PROOF OF AGREEMENTS BETWEEN DEFENDANT HERRICK AND THE CORPORATE DEFENDANTS; THE DOCTRINE OF CONSCIOUS PARALLELISM THEREFORE HAS NO APPLICABILITY TO THIS CASE.

A. *The Concept of Conscious Parallelism*

Section 1 of the Sherman Act makes unlawful a *contract, combination* or *conspiracy* in restraint of trade. Thus in order to establish liability for a violation of Section 1, one of the essential elements Plaintiff must prove is concerted action—that is—the participation of more

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procedural vehicle to use when a party seeks to vacate an order awarding summary judgment. *Parks* v. *"Mr. Ford"*, 68 F.R.D. 305, 308-309 (E.D. Pa. 1975). See also *United States* v. *Hall*, 463 F. Supp. 787, 791 fn. 1 (W.D. Mo. 1978), aff'd, 588 F.2d 1214 (8th Cir. 1978).

than one person in carrying out the alleged restraint. For example, if an established firm, acting wholly independently of others, attempts to throw roadblocks in the way of an innovative competitor, regardless of the nature of the misdeeds, the lack of the "two or more persons" requirement would insulate the established firm from antitrust liability under Section 1. Let us suppose, by of way of further example, that instead of one established firm engaging in acts designed to prevent an innovative competitor from developing its market potential that there are several established firms engaged in such activity. Assuming that there was no proof of agreement among them (or between any of them) to stifle the innovative competitor, would there be a Section 1 violation? Clearly not. The element of concerted action would not be present. In certain instances, however, it can be demonstrated that all of the defendants have engaged in the same behavior, and that the acts of each of the defendants—if performed independently of the others—would not make good business sense, but these same acts would be ecomically beneficial to all if all participated. Examples of this situation are most frequently found in the refusal to deal, price fixing and group boycott categories. Each business can be presumed to desire as many profitable sales as possible. Thus when an opportunity to make a sale at one's established price is declined, a serious question arises as to why the refusal to sell is made. If, say, all of the major manufacturers of a particular product were to establish a policy of refusing to sell to a retailer who engages in price competition, the fact such refusals to deal are contrary to each of their economic interests, acting independently, can be the basis for a finding of concerted action. The same can be said for a group of retailers who refuse to buy from a wholesaler who competes at the retail level.* In contrast, where

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* *See, e.g., Eastern states Retail Lumber Ass'n* v. *United States*, 234 U.S. 600 (1914).

it makes good business sense for a firm to establish the same policy as its competitors—for example, film distributors only granting first run films to large urban (downtown) theatres rather than small suburban theatres,** or banks charging the maximum inteerst rate permitted by the law ***—there is no basis for a finding of concerted action.

There are two aspects of "conscious parallelism" in the antitrust law that must be distinguished. First, as has been noted above, parallel activity of two or more firms, where such activity is contrary to their economic interests if each were acting independently but in the economic interests of all acting jointly, can in and of itself be the basis under Sherman 1 for satisfying the concerted activity requirement.* In contrast, in cases where the "concerted activity" requirement has already been met by proof of an agreement between two or more persons, proof of additional, consistent, parallel overt acts can also be used by the trier of fact as proof that the alleged anticompetitive acts were performed pursuant to such agreement, as opposed to wholly independent reasons or motivations. In the former case the "contrary to eco-

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** See *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877 (8th Cir. 1978).

*** See *Weit* v. *Continental Ill. Nat'l Bank*, 641 F.2d 457 (7th Cir. 1981).

* There is another distinguishing factor that must be kept in mind, which is the fact that in nearly all "conscious parallelism" cases there is nothing wrongful about the conduct alleged if performed independently, and that it is the concerted nature of the activity (i.e. price fixing, concerted refusals to deal, group boycott, etc.) that constitutes the antitrust violation. This is in marked contrast to cases in which it is alleged that conduct wrongful or toritous in and of itself is carried out by means of concerted activity. In the latter type of case failure of the defendants to explain an alternative motivation for the wrongful conduct, where an obvious anticompetative motive exists, would tend to corroborate the existence of the conspiracy.

nomic interests" proof is essential. In the later case there is no logical basis for such requirement.

B. *Proof of Each Herrick/Corporate Defendant Agreement Establishes the Concerted Activity Requirement under Sherman 1.*

Let us assume, for the moment, that rather than bringing this action against all of the defendants, the case had been brought against Defendants Herrick and Phillips-Roxane, Inc. alone. Plaintiff at trial would first establish that Herrick had at one point expressed favorable views towards Impro, had placed an article favorable to the company in a learned journal, and expressed an interest in assisting the company in marketing its products. Further assume that Impro is then able to establish that Herrick's interest in helping Impro suddenly waned when it became apparent that he was not going to get paid for his efforts. Let us then further assume that Impro is able to establish that its products offer a substantial competitive threat to Philips Roxane. Let us then add evidence that (1) Philips Roxane entered into a contract with Herrick which by the admission of both of them is in the commercial area—that is—the marketing of products as opposed to technical advice, and (2) the fact that Herrick reversed his position and commenced a virtual campaign against Impro. Based on this record a material fact issue would arise as to whether Herrick was acting against Impro on behalf of Philips Roxane (clearly a conspiracy to restrain trade) or for reasons independently of the Herrick/Philips Roxane relationship. Plaintiff submits that under these facts it could prove its case against any of the defendants individually, with Herrick as the co-conspirator. Two quesitons then arise: (1) Did Impro plead itself out of court by bringing into the case more than one corporate defendant on whose behalf Herrick is alleged to have acted; and (2) does proof that the corporate defendants were

simultaneously engaged in addition, public opposition to the development of intrastate laboratories (Impro being one of the two targets of this activity) make it more likely that Herrick's activities were performed in order to advance what he perceived to be his clients interests? Plaintiff submits, in answer to the first question, that even if at trial it were determined that a so-called "rimless wheel" conspiracy existed, all that is required among the "spokes" in such a conspiracy is a factual basis for an inference that other parties must be involved. *See* Kintner, *Federal Antitrust Law*, at S9.3, p. 10 at fn.33; *Elder-Beermen Stores* v. *Federated Department Stores*, 459 F.2d 138 (6th Cir. 1972); and *Harlem River Consumers Cooperative* v. *Associated Grocers of Harlem, Inc.*, 408 F.Supp. 1251 (S.D.N.Y. 1976). In answer to the second question, it is clear that Plaintiff does not rely on "other acts" as evidence of "conscious parallelism" to overcome the concerted action requirement of Sherman 1, but rather relies upon this evidence as further proof as to the defendant's interest in opposing Impro's development in its capacity as an intrastate laboratory.

III. THE PUBLIC POLICY CONSIDERATIONS THAT UNDERLIE HOLDING CORPORATIONS LIABLE FOR THE ANTICOMPETITIVE ACTS OF THEIR AGENTS APPLY EQUALLY TO CONSULTANTS ACTING SECRETLY ON THEIR BEHALF

Antitrust law is much like Constitutional law, in that the federal courts play a critical role in shaping, modifying and developing the law, in response to an ever changing business and economic climate. As Judge Wyzanski stated in *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 (D.Mass. 1953):

> In the antitrust field the courts have been accorded, by common consent, an authority they have in no other branch of the law.

This judicial interpretative process was discussed by the Supreme Court in *Apex Hosiery Co.*, v. *Leader*, 310 U.S. 469, 489, 60 S.Ct. 982, 989-90, 84 L.Ed. 1311, 1320-21 (1940):

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, and in the performance of that function *it is appropriate that courts should interpret its words in light of the legislative history and of the particular evils at which the legislation was aimed.* (emphasis added).

Particularly in the heavily regulated industries, enormous potential economic dislocations, of the nature that the antitrust laws were designed to prevent, can result from the co-opting of or compromising of government officials. For this reason, this case raises serious and far reaching issues of public policy and the administration of the antitrust laws.

Although Plaintiff by no means concedes that it will be unable to prove a conspiracy directly aimed at Impro, even if a jury were to find, at a minimum, that the corporate defendants entered into a contract with Extension Veterinarian Herrick which simply called for Herrick to look out for their best economic interests, and Herrick then commenced throwing roadblocks in the path of Impro's development as one way to carry out this general consulting assignment, this would be a more than adequate basis in the law to hold the corporate defendants to account for the anticompetitive acts of its secret consultant. It has long been recognized that if a corporation lends apparent authority to an agent, the corporation is responsible for the antitrust violations of such agent acting within the scope of his authority even if the agent acts in contravention of the express orders, policies and

wishes of his company. See, *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1004-107, (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir.), *cert. denied.*, 437 U.S. 9032 (1978); *United States* v. *American Radiator & Standard Sanitary Co.*, 433 F.2d 174, 204 (3rd Cir. 1970), *cert. denied*, 401 U.S. 948 (1971). To hold a corporation liable for the anticompetitive acts of its consultants, pursuant to a consulting agreement that calls for assistance in the commercial area, would be consistent with this policy.

Further, even if a jury were to believe the corporate defendant's protestations that they only intended Herrick to perform lawful acts in the course of his alleged consulting duties, "a civil violation of the antitrust laws may be established by proof *either* of an unlawful intent *or of an anticompetitive effect.*" *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 243, (1980), *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436, n.13 (1978).

Even minor actions by an individual with the influence both within and outside federal and state government possessed by Extension Veterinarian Herrick can have a devastating effect on the future of a new competitor in the animal health field. Indeed the evidence in this case demonstrates how efficiently such power can be used. Once private corporations take it upon themselves to "buy" a federal official, they should be held to account for his anticompetitive conduct. To hold otherwise would permit private companies to compromise such government officials by hiring them as "consultants" to do whatever appears to the official to be in the company's best interest, and to then disavow the relationship if the official is found to be engaging in anticompetitive conduct. It is all too easy when the official takes an action that seriously impacts a competitor, to simply swear that the anticompetitive acts were not part of the "consulting" arrangement.

The Supreme Court in *American Society of Mechanical Engineers* v. *Hydrolevel Corp.* —— U.S. ——, 1025 S.Ct. 1935 (1982) recently upheld a verdict of antitrust liability on the part of an association for acts of its agent, which were performed by the agent without the associations' active participation. The public policy of holding the association responsible for its agent's acts played a big role in the decision in that case:

> A principal purpose of the antitrust private cause of action, see 15 U.S.C. 15, is of course, to deter anticompetitive practices. *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 314, 98 S.Ct. 584, 588, 54 L.Ed.2d 563 (1978); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S., at 139, 88 S.Ct., at 1984; see *Reiter* v. *Sonotone Corp.* 442 U.S. 330, 342-344, 99 S.Ct. 2326 2332-2333, 60 L.Ed.2d 931 (1979). It is true that imposing liability on ASME's agents themselves will have some deterent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. "[P]ressure [will be] brought on [the organization] to see to it that [its] agents abide by the law." *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 126, 79 S.Ct. 203, 207, 3L.Ed.2d 165 (1958). Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus a rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.

The wisdom of the apparent authority rule becomes evident when it is compared to the alternative approaches advanced by the District Court's instructions to the jury, see supra, at 1941, and advocated ASME. First, ASME insists that it should not be held liable unless it ratified the actions of its agents. But a ratification rule would have anticompetitive effects, directly contrary to the purposes of the antitrust laws. *ASME could avoid liability by ensuring that it remained ignorant of its agent's conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents. Thus, ASME's ratification theory would actually enhance the likelihood that the society's reputation would be used for anticompetitive ends.*

Second, ASME contends that it should not be held liable unless its agents act with an intent to benefit the Society. This proposed rule falls short, though, because it is simply irrelevant to the purposes of the antitrust laws. Whether they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practice of all its agents acting with apparent authority, especially those who use their positions in ASME solely for their own benefit or the benefit of their employers. (emphasis added).

This case revolves around one critical and very material fact question: was Herrick acting on behalf of the corporate defendants, or for some other reason? For

Herrick to get a jury to believe that he was acting in good faith he has a lot of explaining to do concerning his early enthusiasm for Impro. Plaintiff submits that there are strong public policy considerations favoring antitrust liability in this case, and that the matter should properly be submitted to a jury for a determination of these important issues.

IV. THERE ARE SUBSTANTIAL CREDIBILITY ISSUES IN THIS CASE CONCERNING THE SCOPE OF THE HERRICK/CORPORATE DEFENDANT AGREEMENTS

As was correctly pointed out by the Court's Memorandum Opinion at 8-9, one of the central issues in this case is whether Herrick's activities against Impro were conducted as part of the conspiracy. If the agreements between Herrick and each of the corporate defendants were true consulting arrangements, one would suppose that both Herrick and the corporate defendants would be able to reach some common understanding as to what Herrick's role was, and that there would be no reason to keep the relationship secret. The record demonstrates, however, considerable inconsistencies in the mutual understanding as to the scope and terms of the relationship. For example, Herrick reported to Iowa State University one or two days a year of "consulting" with the corporate defendants, for amounts ranging up to $10,000 for RM&D. Upjohn issued checks to Herrick for "research", yet Herrick says he did no research for Upjohn. (Herrick Dep. at 521-24). Herrick says he works for Philips Roxane for two days a year while John Thompson claims Herrick works for that firm ten days a year. (See Herrick Dep. at 319, Thompson Dep. at 338). There is little evidence in the record that Herrick did anything of substance for RM&D for his $10,000 per year.* Serious ques-

* There is also a conflict of testimony as to whether RM&D reported annually to American Cyanamid concerning the consulting

tions about Herrick's credibility in general have also been raised. Herrick is obligated to report his outside consulting relationships to Iowa State University, yet in 1978 he disclosed *no* such relationships. (Dep. of Dean Pearson at 35-50). Apparently Herrick saw his contacts with senior USDA executives as official business for Philips Roxane, inasmuch as entertainment expenses for drinks at a convention for such officials were billed by Herrick to that firm. (Herrick Dep. at 635-637).

The Court's finding that none of the corporate defendants knew that the other corporate defendants were utilizing Herrick's services is not accurate in one respect. Noman Jungk knew about the Diamond/Herrick connection while at Diamond in 1964, and learned of the Philips Roxane/Herrick relationship while employed by Philips Roxane in 1972 (Jungk Dep. at 33, 35).

In view of the serious credibility issues that revolve around the actual scope of the Herrick/corporate defendant agreements, as well as credibility questions as to whether Herrick's actions were taken pursuant to the agreements, summary judgment in this case was clearly inappropriate.

V. CONCLUSION

In preparing its Opposition to Defendant's Motion for Summary Judgment, Plaintiff was of the view that the anticompetitive acts that demonstrated the operation of the conspiracy in this case were of paramount importance, and Plaintiff may have inadvertently given inadequate attention to explaining its theory of concerted action. Plaintiff submits that the doctrine of "conscious parallelism" has no applicability to a case in which the major

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relationship. Compare Donofrio Dep. at 55-56 with Reynolds Dep. at 35. It should be noted that Herrick and American Cyanamid continued to have contacts after RM&D and Herrick entered into this agreement. See Herrick Dep. Ex. #243, 244 and 250. Donofrio also "thinks" Cyanamid would entertain the thought of reimbursing RM&D for legal expenses in this case. (*Donofrio* Dep. at 50-51).

fact issue is whether particular anticompetitive acts were undertaken pursuant to an agreement, which is conceded to exist, but concerning which the terms and purpose are disputed. Plaintiff further submits that there are strong public policy considerations favoring antitrust liability on the part of the corporate defendants in this action, and that there are credibility questions that can only be properly resolved at trial.

Respectfully submitted,

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APPENDIX RB

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 78-235-2

IMPRO PRODUCTS, INC., a Minnesota corporation,
Plaintiff,

—vs.—

JOHN B. HERRICK, DIAMOND LABORATORIES, INC., a Delaware corporation; BABSON BROS. CO., an Illinois corporation; G. D. SEARLE COMPANY, a Delaware corporation; RICHARDSON, MEYERS & DONOFRIO, a Maryland corporation; UPJOHN CO., a Delaware corporation; and PHILIPS ROXANE, INC., a Delaware corporation,
Defendants.

DEPOSITION OF NORMAN K. JUNGK, produced, sworn and examined on Friday, the 25th day of June, 1982, between the hours of 8 a.m. and 6 p.m. of said day, at the law offices of Blackwell, Sanders, Matheny, Weary & Lombardi, 600 Five Crown Center, 2480 Pershing Road, in the City of Kansas City, County of Jackson and State of Missouri, before:

DANNY S. PEAK,

a Notary Public within and for the County of Jackson and State of Missouri, in a certain cause now pending in the United States District Court for the Southern District of Iowa, Central Division, wherein IMPRO PRODUCTS, INC., a Minnesota corporation, is Plaintiff and

JOHN B. HERRICK, DIAMOND LABORATORIES, INC., a Delaware corporation; BABSON BROS. CO., an Illinois corporation; G. D. SEARLE COMPANY, a Delaware corporation; RICHARDSON, MEYERS & DONOFRIO, a Maryland corporation; UPJOHN CO., a Delaware corporation; and PHILIPS ROXANE, INC., a Delaware corporation, are Defendants.

Taken on behalf of Plaintiff.

* * * *

[8] Q And for how long did you hold the position of production manager for biologics at Diamond?

A About—about three years.

Q Sometime in 1959, did you subsequently receive a new job title?

A About '59 or '60 I became executive vice-president which entailed the duties of a technical vice-president. The title was officially executive vice-president, but the duties were related to the technical side of operations. I had no responsibilities for marketing or sales during my entire period at Diamond. It was all related to the technical functions.

[9] Q Now, when you say the technical function, what exactly does that entail?

A Manufacturing, quality control, and professional service.

Q And what duties would you have with respect to supervision of manufacturing as executive vice-president?

A I would hire and supervise key managers. I would plan production schedules as required by the company for marketing, and I was responsible for the master plan which encompassed the development of new products and bringing them on stream for marketing.

Q Now, would this be—

A I was also—as technical director, I was also in charge of research.

Q You were director of research?

A I was in charge of research. I was not director.

Q Now, as executive vice-president, would you have just been in charge of biologicals or were they also producing, manufacturing or distributing antibiotics?

A We were formulating pharmaceutical products at that time which included the formulation of antibiotics.

Q But when you originally took over the position as executive vice-president, Diamond was not manufacturing, marketing or selling any pharmaceuticals?

[10] A At the time I took over the position, they were already manufacturing and selling pharmaceuticals, and had been well established in that for some years.

Q So you would have also taken over those functions or been in charge of pharmaceutical production?

A I was at the time I became vice-president, yes, but this program had been ongoing for a number of years.

Q I see. Now, from 1956 to 1959, did—prior to your accepting a new position, did your employment responsibilities or duties ever change as production manager for biologics, in that you gained new responsibilities or lost former responsibilities?

A Not substantively.

Q Did there come to be a point in time where you ever had any supervision over pharmaceutical products?

A Yes.

Q Prior to your becoming executive vice-president?

A No, no participation whatsoever in pharmaceutical products prior to about 1959, 1960.

Q Okay. In addition you listed one of your duties was overseeing quality control?

A Yes.

Q And what did that entail?

A The testing of all products prior to release and issuing a release for those products.

[11] Q Was that the extent of your involvement with quality control, just the testing?

A I supervised the manager of quality control who personally supervised those functions.

Q I think you also mentioned that one of your duties was with respect to professional services?

A Yes.

Q What does that entail?

A Professional services is a service which veterinary, pharmaceutical, and biological companies offer to those veterinarians, livestock owners, which use their products and involves technical advice, technical discussions relative to problems, related to immunization related to disease.

Q Would that be a position otherwise known as technical services?

A Yes.

Q Similar to the position that Dr. Daniels formerly held at Philips Roxane?

A Yes.

Q Do you know who at Diamond currently holds that position?

A No.

Q With respect—was that the extent of your duties with respect to professional services?

[12] A Yes.

Q With respect to being in charge of research, what did that entail?

A The administrative planning of research programs in cooperation with marketing and the research director?

Q Who was the marketing and research director at that time, would those have been two individuals or one individual?

A At that time it was one individual.

Q And what was that person's name?

A And his name was Mr. William Wittern, W-i-t-t-e-r-n.

Q And did your duties—for how long did you hold this position as executive vice-president?

A Until such time as I departed in July of 1964.

• • • •

[33] Q And how did you become aware of that fact?

A I do not remember at this time.

Q Did he have any type of input with respect to any of your responsibilities?

A No, he did not.

Q Do you know to whom he reported?

A Not specifically, I do not know.

Q Well, you were at that time the executive vice-president in charge of manufacturing, quality control, professional services and research?

A That's true.

Q Would Dr. Herrick have been reporting to anyone in your departments?

A No, he was not.

Q Do you know what duties Dr. Herrick had as a paid consultant for Diamond Laboratories?

A I believe he gave general information on sales.

Q He would not provide technical knowledge?

A No, not to the technical departments.

Q Do you know from whose budget Dr. Herrick's consulting fees were being paid?

A I do not know, but they were not from the technical department budgets.

• • • •

[35] Q Was it your understanding that Dr. Herrick was a consultant prior to 1964 for Diamond?

A As I mentioned earlier, that was my first knowledge of it, was in 1964.

Q Well, you became aware of it—

A In 1964, that's true.

Q However, when you became aware, were you aware that he may have been previously consulting, or was it your awareness that this is when his consulting began?

A I have no recollection as to when he might have begun consulting for Diamond Laboratories.

Q Were you aware that Dr. Herrick was a paid consultant of Philips Roxane after you subsequently became reemployed by them?

A Yes.

Q And when did you become aware of that fact?

A Approximately 1972.

Q And do you recall how you became aware of that fact?

A Yes. Dr. Herrick spoke at a staff meeting.

* * * *

[36] Q When you became aware that Dr. Herrick was a consultant for Philips Roxane, did you ever indicate to anyone that you were previously aware that he had been consulting for Diamond?

A No, I did not.

Q You never remember telling anyone at Philips Roxane that Dr. Herrick was formerly a Diamond consultant?

MR. BORTHWICK: I object to the question as repetitious. Go ahead.

THE WITNESS: I don't remember discussing that at all.

* * * *

[41] Q In 1964, did you subsequently leave employment at Diamond Laboratories?

A Yes, I did.

Q And with whom did you seek employment?

A Pure Laboratories, Incorporated.

Q And where was Pure Laboratories, Incorporated, located?

A Pure Laboratories was incorporated in the State of New York and located in Parsippany, P-a-r-s-i-p-p-a-n-y—I'm not sure I spelled that correctly. P-a-r-s-i-p-p-a-n-y, New Jersey.

Q And how did you come to become employed at Pure Labs?

A I visited the owner.

Q And who was that?

A Mr. C. C. Wang, W-a-n-g.

Q And was this a federally-licensed lab?

A This was a human—this laboratory manufactured human pharmaceutical drugs and in the broad sense of the word "licensing", was licensed to manufacture certain human pharmaceutical products.

• • • •

[42] Q And what was the name of that product?

A The general name of the product is Pen-Dihydro, D-i-h-y-d-r-o. And it is an antibiotic for cattle. And we did manufacture that at Pure. It was one of a number of products that Pure manufactured, and the only one that was sold in the veterinary market.

Q Do you know if this was sold through licensing agreements with other manufacturers?

A It was not sold through licensing agreements, no.

Q It was sold directly to the consumers?

A It was sold just as any sale would take place, and it was a business sale.

Q To sell the entire product to a company?

A Yes.

Q Would they relabel the product and put their labels on it?

A We may have sold some unlabeled products. Primarily we sold labeled products.

Q Okay. Are you aware of any sales of either labeled products or unlabeled products to either the Anchor Serum Company or any predecessors, or people who may have subsequently acquired Anchor or Diamond Laboratories of that product?

A I do not believe we sold Anchor. I am uncertain of [43] Diamond.

Q You may have sold this product to Diamond?

A We may have. I am uncertain.

Q And what was your job—or what was your title at Pure Labs?

A I was vice-president in charge of operations.

Q And how long would you have remained employed at Pure Labs?

A From 1964 until 1968.

Q And why did you leave Diamond Laboratories, was there any personality problems or did you perceive this as being a better job or were there other reasons?

A I perceived my opportunities at Pure Laboratories to be greater.

Q And in 1968, you left Pure Laboratories?

A Yes.

Q And what did you then do?

A I created a company of my own called Romar Laboratories, R-o-m-a-r, with headquarters in Hanover, New Jersey.

Q And what did Romar Laboratories do?

A They manufactured human pharmaceuticals, and a limited, small amount of veterinary pharmaceuticals.

Q Which animal pharmaceuticals would they have been manufacturing?

[44] A Sulfa drugs.

• • • •

Q And did there come to be a time when you eventually returned to Philips Roxane, or was that Anchor at that time?

A It was Philips Roxane at the time I returned in April of 1970.

Q Does Romar Laboratories still exist?

A I do not know.

Q Did you sell that company?

A Yes.

Q And why did you sell the company and seek employment at Philips Rozane?

A Because of financial considerations.

• • • •

[45] Q And in 1970, did you take the position of director of quality assurance for Philips Roxane?

A Yes.

Q And with whom would you have contacted to take a position with Philips Roxane?

A Dr. Fred Murdock.

Q You would have just contacted Dr. Murdock directly?

A Yes.

Q Did you feel that you knew Dr. Murdock well enough to directly contact him?

A Yes.

Q And what was his position at that time?

A President of Philips Roxane.

* * * *

[139] Q You were aware that he was a consultant in 1978?

A Yes, I was aware of that.

Q So when you saw him in 1972 speak to the staff members, that was'nt your only indication of his being a consultant, was it?

MR. BORTHWICK: Well, he's never testified to that. I object to the argumentative question. He's never said that.

THE WITNESS: I knew on an ongoing basis that Dr. Herrick was a consulant, yes.

Q (By Mr. Daniels) Okay. Now, just to clarify the record, was that also true of Dr. Herrick's consulting relationship and your knowledge as to Dr. Herrick's consulting relationship with Diamond Laboratories?

A I had no knowledge of Dr. Herrick's relationship with Diamond Laboratories since I left Diamond Laboratories in 1964.

* * * *

APPENDIX RC

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2124

IMPRO PRODUCTS, INC.,
Plaintiff-Appellant,

v.

JOHN B. HERRICK, BABSON BROS. CO.,
RICHARDSON, MYERS & DONOFRIO, UPJOHN CO.
AND PHILIPS ROXANE, INC.
Defendants-Appellees

On Appeal From the United States District Court
For the Southern District of Iowa

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ISSUES PRESENTED

1. Whether the District Court erred in granting Summary Judgment on the basis of a finding that the evidence failed to establish the "concerted action" element of a Sherman Act § 1 violation.

American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., —— U.S. ——, 102 S.Ct. 1035 (1982).

International Travel Arrangers, Inc. v. Western Airlines, Inc., 635 F.2d 1935 (8th Cir. 1982).

2. Whether the District Court further erred in relying upon the concept of "conscious parallelism" in an attempt to find concerted action among the defendants.

Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8tth Cir. 1978)

First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968)

Weit v. Continental Ill. Nat'l Bank and Trust Co., 614 F.2d 457 (1981)

3. Whether the extent of knowledge of each corporate defendant concerning the participation by others in the alleged conspiracy was a matter to be ruled upon by the Court at the close of trial upon framing the jury instructions, rather than prior to trial on the basis of Motions for Summary Judgment.

United States v. Jackson, No. 81-2411 (8th Cir.) slip op. filed December 28, 1982.

Elder Beerman Store Corp. v. Federated Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972).

APPENDIX RD

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2124

IMPRO PRODUCTS, INC.,
Plaintiff-Appellant,

v.

JOHN B. HERRICK, BABSON BROS. CO.,
RICHARDSON, MYERS & DONOFRIO, UPJOHN CO.
AND PHILIPS ROXANE, INC.
Defendants-Appellees

On Appeal From the United States District Court
For the Southern District of Iowa

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